Supreme Court, U.S.
FILED
DEC 01 2010
OFFICE OF THE CLERK

No. 10-441

In the Supreme Court of the United States

JANICE R.,

Petitioner,

v.

DEBRA H.,

Respondent,

- and -

ANTHONY PARISI III
Attorney for the Child M.R.,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF RESPONDENT DEBRA H. IN OPPOSITION

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QUESTIONS PRESENTED

1. In a dispute regarding the parentage of a child born to a couple who had voluntarily entered into a Vermont civil union prior to the child's birth, whether the decision of the New York Court of Appeals to follow New York comity principles and accord respect to Vermont law presents a federal constitutional question for this Court's review, especially when Petitioner failed to preserve her purported federal choice-of-law claim.

2. Whether Petitioner's Due Process rights enunciated in *Troxel v. Granville*, 530 U.S. 57 (2000), were violated by the unanimous decision of the New York Court of Appeals to apply New York comity principles in determining that a child conceived using an anonymous sperm donor and born to a couple who entered into a Vermont civil union prior to the child's birth is the child of both members of the couple.

LIST OF PARTIES TO THE PROCEEDING

In addition to Petitioner Janice R. ("Petitioner" or "Janice") and Respondent Debra H. ("Debra"), included in Petitioner's list of parties provided pursuant to Rule 14.1(b), there is another party to this proceeding, the court-appointed representative of M.R., the seven-year-old child at the center of this case. Anthony Parisi III, the court-appointed attorney for the child ("attorney for the child"), who opposed Petitioner in the state court appellate proceedings, is an additional Respondent pursuant to Rule 12.6.

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INTRODUCTION

Petitioner seeks review in an ongoing custody dispute of a unanimous decision of the New York Court of Appeals rendered purely on state law grounds. The New York high court applied New York comity principles to recognize the Vermont civil union Petitioner voluntarily entered into with Debra while Petitioner was pregnant with the couple's child, conceived using anonymous donor sperm. All seven judges of the court agreed that, consistent with New York law and public policy, the civil union should be accorded recognition for purposes of establishing the parentage of the child born to the couple in New York, where they all reside.

Petitioner did not even assert below the federal Due Process objections to New York's extension of comity to Vermont law, which she only now raises in point I of her Petition. This Court should reject Petitioner's attempt in this family law dispute to transform into a federal case a state court's interpretation of its own state comity principles. The Petition should be denied because (1) it relies on purported federal constitutional claims not preserved below and without any merit, (2) it presents neither an important nor an incorrectly decided federal question or other compelling reason for this Court to review a state choice-of-law ruling in the family law context, where states are accorded particular deference, (3) there is no conflict between the New York ruling and decisions of other state or federal appellate courts or of this Court, and (4) the case is an especially poor candidate for review, given

its highly fact-bound circumstances unlikely to arise again and the ongoing proceedings on remand.

STATEMENT OF THE CASE[1]

Janice and Debra were a committed same-sex couple who together planned for M.R.'s conception by Janice using an anonymous sperm donor.[2] Although Janice later denied it, before M.R. was even conceived she promised that when the baby was old enough Debra would enter into a second-parent adoption, as is permitted under New York law, and that Debra would always be the child's second parent. App. 55a, 57a-58a; R. 121 ¶ 5. Janice moved into Debra's apartment, where the couple furnished their expected baby's nursery, and the couple registered as New York City domestic partners. App. 54a.

In November 2003, when Janice was eight months pregnant, she and Debra travelled to Vermont to enter into a civil union together. App. 54a. At that time a Vermont civil union was the most significant state-conferred legal relationship

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[1] Janice makes a number of misrepresentations and omissions in her Statement of the Case and fails to acknowledge sharp fact disputes regarding a number of her allegations. The Court of Appeals opinion summarizes facts material to its decision. *See* App. 1a-6a, 21a-24a. The New York State Supreme Court opinion also recounts in detail the parties' factual assertions. *See* App. 54a-65a.

[2] Contrary to Petitioner's contention, Pet. 7, M.R. was conceived using *in vitro* fertilization at a clinic in New Jersey, not in New York. *See* Record on Appeal before the New York Court of Appeals ("R.") 902.

available anywhere in the nation to a same-sex couple. Janice concedes that *both* "parties chose to avail themselves of the Vermont civil union statute." Pet. 25. Janice, herself a lawyer, claims to have first conducted legal research and conferred with an attorney about the legal consequences in New York of entering into a civil union. App. 23a-24a. As discussed in point I below, at that time the only New York case to address the question had accorded comity to the Vermont civil union of New York residents. Debra understood and expected that the civil union would provide protections for their child equivalent to those flowing from marriage, and certainly believed Janice understood this as well. R. 906 n.8. As the Court of Appeals noted, "Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H." App. 24a.

In the state court proceedings, Debra presented extensive witness affidavits and documentary evidence showing that, in addition to entering into a civil union in advance of M.R.'s birth, the couple in many other ways evinced their intention that Debra would be M.R.'s second parent, and that Debra in fact functioned as his parent. R. 119-552, 560-66, 890-1161. For example, Debra was actively involved in M.R.'s prenatal care and birth, cutting the umbilical cord and staying overnight in the hospital room with Janice and their new baby. App. 57a; R. 220. Janice arranged for Debra's last name to be M.R.'s middle name on his birth certificate. App. 54a; R. 669 ¶ 29. In the months and years that followed, Debra and Janice raised M.R. together, both as his parents. App. 58a-59a. Debra was

identified with Janice as M.R.'s parent on birth announcements; in religious ceremonies and certificates; in numerous cards Janice herself wrote to Debra; on school and camp lists and forms; to health care professionals, family and friends; and to M.R. himself. App. 58a-59a. Even after the adults' relationship frayed and Janice moved into an apartment near Debra's, the two continued to co-parent together. App. 55a-56a. "Both women . . . expected, and led the other to expect, that both of them would be the child's parents." App. 45a (Smith, J., concurring).

When M.R. was nearly four-and-a-half years old, Janice threatened to sever Debra's relationship with him. Debra immediately commenced this proceeding in Supreme Court, New York County, to secure her rights as a parent to custody and visitation and to provide child support. App. 2a. In a decision and order dated October 2, 2008, the trial court ruled that the facts alleged by Debra, if proven to be true at a hearing, establish a *prima facie* basis for applying the doctrine of equitable estoppel to enforce the rights of Debra and M.R. to maintain their parent-child relationship. App. 73a. The court also appointed the attorney for the child to represent M.R. in further proceedings. App. 75a.

Janice appealed to the Appellate Division, which reversed in a decision dated April 9, 2009, holding that the doctrine of equitable estoppel is unavailable in New York to a party who is neither the biological nor adoptive parent of a child. App. 50a-52a.

On September 1, 2009, the New York Court of Appeals granted Debra and the attorney for the child

permission to appeal. App. 6a. On May 4, 2010, all seven judges of that court, in four separate opinions, concurred that the party's Vermont civil union and Debra's resulting parentage of M.R. under Vermont law should be accorded comity in New York. *See* App. 24a-27a (majority), 34a-35a (Graffeo, J., concurring), 36a (Ciparick, J., concurring), 48a (Smith, J., concurring). The majority held that "in this case [we] decide only that New York will recognize parentage created by a civil union in Vermont." App. 27a. In concurrences, three judges opined that, in addition to Debra's parentage established as a matter of comity, New York common-law and equitable principles also afford Debra other avenues for establishing parentage. App. 40a (Ciparick, J., joined by Lippman, C.J.), 46a (Smith, J.). The court concluded that its "determination that Debra H. is M.R.'s parent allows her to seek visitation and custody at a best-interest hearing," and remitted the case to the trial court for that hearing. App. 27a.

Janice's motion for reargument was denied by the Court of Appeals on July 1, 2010. App. 76a. This Petition followed. A forensic evaluation is underway in the trial court, with the best-interest hearing yet to be scheduled.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed To Preserve The Constitutional Claim Raised In Her First Question Presented, Which Is Also Without Merit Because, Having Voluntarily Submitted To Vermont Civil Union Law, She Is Not Denied Due Process By New York's Giving Comity To It.

A. Petitioner Did Not Preserve The Federal Claim She Now Asserts.

Petitioner's first question presented, the argument in support of which comprises the bulk of her Petition, *see* Pet. 2-5, 13-27, was not preserved for review, and thus this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to hear it. Petitioner argues that the state court's choice-of-law determination violates the federal Due Process guarantee. She manufactures this purported federal claim in a last-ditch effort to transform a state law issue into a federal case. Petitioner never raised this federal question at any point in the state proceeding, and nor did the state courts address or rule on it. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court. . . .").[3]

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[3] Petitioner's first question presented also asserts that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, was *(cont'd)*

Petitioner's vague Rule 14.1(g)(i) statement is tell-tale proof that she cannot meet her "burden of showing that the issue was properly presented" to the New York Court of Appeals. *Adams*, 520 U.S. at 86. She only generally asserts that the "extra-territorial applicability of the Vermont law" and "[t]he question of giving the Vermont civil union

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violated by the New York court's decision to accord legal respect to the laws of a sister state. The caption of point I, corresponding to the first question presented, references only a Due Process claim, and Petitioner does not explain in her argument what, if any, violation of Full Faith and Credit could have occurred by New York's according comity to Vermont's law, or whether she is even pressing such a claim. Pet. 13. Later, at page 27, for the first time Petitioner vaguely references the Equal Protection guarantee. Petitioner's failure to present with "clarity" the points she proposes to be considered "is sufficient reason for the Court to deny" the Petition. Rule 14.4. Moreover, as with her unpreserved Due Process claim, she never asserted Full Faith and Credit and Equal Protection claims below "at the time and in the manner required by the state law," and so failed to preserve them for this Court's review. *Webb v. Webb*, 451 U.S. 493, 501 (1981). Nor is there any merit to a claim that the New York Court of Appeals violated her rights under these guarantees by according comity to the legal status she voluntarily entered into in a sister state. The protections the court afforded M.R. in recognizing the Vermont civil union his parents entered in anticipation of his birth is not a *deprivation* of Full Faith and Credit and Equal Protection, but the fulfillment of those guarantees. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (Full Faith and Credit Clause "implicates the federal interest in ensuring that [the forum state] respect the sovereignty" of a non-forum state by applying the non-forum state's laws) (Stevens, J., concurring); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (equal protection violated by denying children born outside of marriage rights to parental support).

force as a result of comity" were raised and addressed in decisions below. Pet. 12. This statement does not describe a federal constitutional claim but merely the state law grounds considered by the New York courts and on which the Court of Appeals ultimately based its decision. Notably, contrary to the dictates of Rule 14.1(g)(i), Petitioner never even references the question she raises only now — a purported federal constitutional problem with New York's decision to respect Vermont law — much less the specific places in the record and decisions below where any party or court addressed the issue before. This of course is because her purported federal claim was not once raised or considered below. *See Adams*, 520 U.S. at 86 ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented."). Indeed, not one of this Court's decisions on which she relies in point I of the Petition was even cited, much less discussed, in any of the briefing or decisions in the New York courts.

B. Petitioner's Unpreserved Claim Is Without Merit And Does Not Present An Important Question For Review.

It is no surprise that Petitioner's Due Process claim was never raised below, given its palpable lack of merit. The gist of Petitioner's claim is that she could have no "reasonable expectation[]" in November 2003 that her Vermont civil union might be honored by New York courts, and so she was deprived of Due Process when the Court of Appeals determined that the civil union she voluntarily

entered prior to M.R.'s birth is entitled to comity under New York law. Pet. 4.

This unpreserved Due Process claim is contrary to the undisputed facts and state law, as interpreted by the New York Court of Appeals, the final authority on such questions. Janice, a lawyer, concedes that she "chose to avail" herself "of the Vermont civil union statute." Pet. 25. That statute imposed no Vermont residency requirement for entering into a civil union. Having availed herself of a Vermont civil union, Petitioner could not reasonably expect that absolutely no consequences might follow in New York. As the New York court held: "[i]n fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003." App. 24a. The court explained that the only New York ruling "to consider the consequences in New York of a Vermont civil union was issued in April 2003 — several months before Debra H. and Janice R. entered into their civil union — and was widely publicized." App. 25a n.5. That ruling, *Langan v. St. Vincent's Hospital of N.Y.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. 2003), *rev'd*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (App. Div. 2005), accorded comity in a wrongful death action to the Vermont civil union entered into by New York residents.[4]

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[4] Indeed, shortly after the parties' civil union and M.R.'s birth, the New York State Attorney General, relying on *Langan*, issued a widely publicized opinion confirming that, "[c]onsistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." *See* Inf. Op. N.Y. Att'y Gen. 2004-1, at 16 (Mar. 3, *(cont'd)*

Moreover, *Langan* expressly noted that the Vermont civil union law "include[s] a presumption of legitimacy for either party's natural child born during the union." *Langan*, 196 Misc. 2d at 448, 765 N.Y.S.2d at 417 (citation omitted). *See* Vt. Stat. Ann. tit. 15, § 1204(f) ("The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."). This directly undermines Janice's claim that, even after reviewing relevant law, she could have no expectation that entering into a civil union when she was pregnant might have ramifications for her child's parentage. "The parties in this case are presumed to have understood the legal ramifications of their decision to enter into a civil union and one of those legal ramifications was that each partner would be a parent of any child born during the union." App. 35a (Graffeo, J., concurring). "[E]ntering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination" permits "no potential for misunderstanding, ignorance or deceit." App. 23a (majority).

Janice misrepresents New York law in many other respects to support her claim that she could have no reasonable expectation that, by entering into a civil union prior to her child's birth and

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2004), *available at* http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/2004/informal/2004_1.pdf.

rearing him with Debra, legally-enforceable rights to maintain a parent-child relationship might vest for Debra and M.R. Although this Court is not the appropriate forum for her to reargue these state law questions, they are, in any event, without merit. For example, contrary to Janice's assertion, Pet. 21-22, and as noted in decisions below, there was significant uncertainty under New York case law, both before and after the time M.R. was conceived, regarding the scope and vitality of *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), and the extent to which parent-child bonds fostered by a legal parent might result in enforceable equitable rights for an adult and child unrelated by biology or adoption. *See* App. 36a-38a (Ciparick, J., concurring), 51a-52a, 67a-72a. Janice is also wrong that civil unions have not been recognized under New York law for dissolution or any other purposes. Pet. 18.[5] She is wrong as well

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[5] *See, e.g.*, *Dickerson v. Thompson*, 73 A.D.3d 52, 56, 897 N.Y.S.2d 298, 301 (App. Div. 2010) (holding that state court has equitable jurisdiction to entertain petition to dissolve New York residents' Vermont civil union); *B.S. v. F.B.*, 25 Misc. 3d 520, 532, 883 N.Y.S.2d 458, 467 (Sup. Ct. 2009) (same); *see also* N.Y. Pub. Health Law §§ 2805-q(1)-(2)(a) (giving same hospital visitation rights of "spouses" to "domestic partners," defined to include those "formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of . . . any state"); N.Y. Pub. Health Law §§ 2994-d(1)(b), 2994-a(7)(a) (giving domestic partners same right as spouses to make health care decisions for partners lacking decision-making capacity and defining domestic partner as N.Y. Public Health Law § 2805-q(2)(a) does); N.Y. Pub. Health Law § 4201 (according surviving domestic partners right to make decisions about disposition of remains, and *(cont'd)*

that the presumption of parentage arises under New York law only if the parents marry before the child's conception. Pet. 19.[6] And she is wrong in her claim that "New York has always had a strong policy against affording judicial recognition to same-sex marriages." Pet. 21.[7]

In fact, the New York Court of Appeals applied settled New York comity principles in reaching the predictable conclusion that the civil union should be recognized for purposes of resolving M.R.'s parentage. *See* App. 24a-25a; *see also, e.g.*, *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 17, 254 N.Y.S.2d 527, 533, 203 N.E.2d 210, 214 (1964) (New York follows "consistent practice of enforcing rights validly created by the laws of a sister State which do not tend to disturb our local laws or corrupt the public").

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likewise defining domestic partner as N.Y. Public Health Law § 2805-q(2)(a) does).

[6] *See* N.Y. Dom. Rel. Law § 24(1) (child "born of parents who prior or subsequent to the birth of such child shall have entered into a civil . . . marriage . . . is the legitimate child of both birth parents"); *Richard W. v. Roberta Y.*, 240 A.D.2d 812, 658 N.Y.S.2d 506 (App. Div. 1997) (presumption applied to child conceived prior to marriage); *Lorie F. v. Raymond F.*, 239 A.D.2d 659, 657 N.Y.S.2d 235 (App. Div. 1997) (same).

[7] *See, e.g.*, *Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009) (upholding recognition of out-of-state marriages of same-sex couples as within government's discretion); *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (App. Div. 2008) (holding that state common law requires according comity to validly entered out-of-state marriages of same-sex couples).

Notably, in the context of recognition of out-of-state marriages, New York has long followed the place-of-celebration rule, liberally according comity to marriages of New York residents who had no contacts to the marriage jurisdiction other than having entered into their unions there. *See, e.g., In re Estate of May*, 305 N.Y. 486, 490, 114 N.E.2d 4, 6 (1953) (granting comity to Rhode Island marriage of New York uncle-niece couple because, under "settled" New York law, "the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated"). New York's strong policy to apply the place-of-celebration rule to recognize a couple's legal status obtained under another jurisdiction's laws obviously offers relevant support for recognition of an out-of-state civil union, even without determining the extent to which New York would equate civil union with marriage. *See* Vt. Stat. Ann. tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage.").

This Court's decisions relied on by Petitioner demonstrate that the predictable choice of law made by the state court here did not cause Petitioner to suffer the degree of "unfair surprise or frustration of legitimate expectations" turning a state's choice-of-law determination into a Due Process violation. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981). Significantly, not a single precedent on which Petitioner relies held that the forum state violates the federal Due Process rights of forum residents by extending comity to a sister state's law where the parties had voluntarily availed

themselves of a legal status conferred by the foreign state. Instead, the Due Process precedents cited by Petitioner tested the extent to which that guarantee protects parties who are not residents of the forum state from being disadvantaged by the forum's unanticipated choice of its own law over that of a jurisdiction more favorable to the non-resident. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985) (Kansas's choice to subject out-of-state defendants to Kansas law in multi-state gas lease class action violated Due Process given that parties had no connection to Kansas and could not have anticipated its law might apply); *Hague*, 449 U.S. at 313-20 (Minnesota's choice to subject out-of-state defendant insurer to disadvantageous Minnesota law did not violate Due Process where insurer could not claim unfair surprise at choice of law); *id.* at 326-27 ("[c]oncern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents") (Stevens, J., concurring).

Even crediting Petitioner's assertions about her expectations in 2003, at most she simply made a poor legal prediction of how her own state's courts would rule regarding the comity due the civil union she had voluntarily entered. She certainly was not subjected to an "arbitrary" or "fundamentally unfair" choice-of-law determination. *Hague*, 449 U.S. at 313. Nor can she claim she suffered disadvantage at the hands of a foreign forum court parochially favoring its own residents and law.

"State courts . . . constantly must apply and develop general legal principles to accommodate novel factual circumstances with the overarching

goal of achieving a just result." *Shutts*, 472 U.S. at 837 n.19 (Stevens, J., concurring). The New York court's decision to apply the Vermont law of which these New York parties concededly "chose to avail themselves," Pet. 25, "'being purely a question of local common law, is a matter with which this [C]ourt is not concerned.'" *Hague*, 449 U.S. at 332 n.25 (Stevens, J., concurring) (quoting *Kryger v. Wilson*, 242 U.S. 171, 176 (1916)).

II. The Ruling Of The New York Court Of Appeals Is Consistent With *Troxel v. Granville* And Does Not Violate Petitioner's Rights As A Parent.

Petitioner claims in her second point that the Court of Appeals determination that Debra is M.R.'s legal parent violates Petitioner's substantive Due Process rights as a fit parent, in conflict with this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). Pet. 28-29. In fact, the state court's decision poses no conflict with the principles enunciated in *Troxel*. While protecting significant constitutional interests of both M.R. and Debra in their parent-child relationship, the New York court's decision in no way violates Janice's constitutional rights.

Troxel invalidated on federal substantive Due Process grounds, as applied to a petition for grandparent visitation, Washington's expansively worded statute allowing "[a]ny person" to seek visitation with a child "at any time," so long as a court determines the visitation to be in the child's best interests. *Troxel*, 530 U.S. at 60, 73 (plurality opinion). A four-judge plurality of this Court opined

that the "breathtakingly broad" scope of the statute failed to give sufficient deference to the judgment of fit parents regarding with whom their children should associate. *Id.* at 67.

Troxel did not address, much less invalidate, state law presuming a child born to a couple in a legally-recognized union to be the child of both partners. None of the Court's opinions in *Troxel* addressed how a state might define parentage. In contrast, in an earlier case, this Court upheld the constitutionality of a presumption of parentage in the spouse of a woman who gives birth to a child during the marriage, even where the presumption operates to establish the legal parentage of a person not biologically related to the child and to exclude the actual biological father. *Michael H. v. Gerald D.*, 491 U.S. 110, 117-30 (1989) (plurality opinion); *id.* at 132-33 (Stevens, J., concurring). In *Michael H.* this Court noted that how to define parental relationships in such contexts is a question of individual state "policy and not constitutional law." *Id.* at 129-30.[8]

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[8] Petitioner complains that the New York court misinterpreted the Vermont Supreme Court's holding in *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (2006), *cert. denied*, 550 U.S. 918 (2007), and should not have read that decision to support a determination that Debra is M.R.'s parent under Vermont law. Pet. 6, 29. Petitioner did not espouse or preserve below her current interpretation of *Miller-Jenkins*. Nor is it this Court's role to intervene to correct one state's interpretation of another state's substantive law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988). In any event it is Petitioner, not the unanimous Court of Appeals, who misreads *Miller-Jenkins*. The Vermont court *(cont'd)*

Nor did *Troxel* establish any absolute right of a birth parent to exclude all other persons from custody or visitation, and it certainly did not establish an absolute right entitling a birth parent to exclude another *parent*. *See, e.g.*, *Troxel*, 530 U.S. at 73 (noting that "[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context.") (plurality opinion). In fact, a number of justices in *Troxel* explicitly differentiated the grandparents' claim before the Court from a custody or visitation claim by a person asserting a substantial parent-child — albeit non-biological or adoptive — relationship. Justice Kennedy, for example, noted that "a fit parent's right vis-a-vis a complete stranger is one thing; *her right vis-a-vis another parent or a de facto parent may be another*." *Id.* at 100-01 (Kennedy, J., dissenting) (emphasis added). Justice Stevens similarly acknowledged the potential claims of a "once-custodial caregiver" or "intimate relation," to whom "it would be constitutionally permissible for a court to award" visitation. *Id.* at 85 (Stevens, J., dissenting); *see also id.* at 77 (Souter, J., concurring) (agreeing with Washington Supreme Court's

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recognized in *Miller-Jenkins* "[m]any factors" establishing the parentage of the non-biological mother in the civil union in that case. 2006 VT 78, ¶56, 180 Vt. at 465, 912 A.2d at 970. The court stressed that "first and foremost" was the undisputed fact "that [the couple] were in a valid legal union at the time of the child's birth." *Id.*; *see also id.* at ¶58, 180 Vt. at 466, 912 A.2d at 971. The court made clear that all the factors it identified need not be present to establish parentage, and that, particularly in light of the parties' civil union, it did not need to determine which may be dispositive in other situations. *Id.*

invalidation of visitation statute on ground that it did "not require the petitioner to establish that he or she has a substantial relationship with the child") (quotations omitted).

The only constitutional rights Petitioner acknowledges even to exist are her own purported interests. Indeed, Petitioner has neglected even to inform the Court that M.R. is represented by counsel who has consistently advocated that the child has a constitutional right to protect his relationship with his second parent. Petitioner ignores the significant constitutional interests M.R. and Debra have in sustaining the parent-child relationship held by the unanimous Court of Appeals to have been legally established as a result of Janice's own actions. A majority of this Court in *Troxel* suggested that the interests of the child and the other significant adult, not only of the birth parent, are relevant in evaluating the birth parent's asserted constitutional claim. *See id.* at 64-65 (plurality) (children are not "'so much chattel'"); *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting) ("There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies — the child."); *id.* at 98 (Kennedy, J., dissenting) ("[A] third party, by acting in a caregiving role over a significant period of time," may establish "a relationship with a child which is not necessarily subject to absolute parental veto.").

This Court also emphasized in *Troxel* the deference due to state courts in defining constitutionally permissible standards to apply to the necessarily fact-bound circumstances presented in such cases. "Because much state-court

adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73 (plurality). "We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101 (Kennedy, J., dissenting).

Consistent with the deference paid to the states in the family law realm, this Court has repeatedly refused to intervene to disrupt the states' ability to determine for themselves how to define parental relationships, including in the context of evolving standards applied to children reared by same-sex partners. *See, e.g., Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (2006), *cert. denied*, 550 U.S. 918 (2007); *In re Parentage of L.B.*, 155 Wn.2d 679, 707-08, 122 P.3d 161, 176-77 (2005) (holding under state common law that lesbian partner of birth parent can establish status as second parent of child born in the relationship), *cert. denied*, *Britain v. Carvin*, 547 U.S. 1143 (2006); *V.C. v. M.J.B.*, 163 N.J. 200, 215-17, 748 A.2d 539, 547-48 (2000) (recognizing lesbian "psychological" parent), *cert. denied*, 531 U.S. 926 (2000).

Other than *Miller-Jenkins*, in which the Vermont Supreme Court reached the same conclusion as the New York Court of Appeals that a child born to a civil union couple is the legal child of both partners, Respondent is aware of no other cases in the nation considering presumptions of parentage arising under a civil union law, or the comity accorded across state lines to the parental status so established. Not only

is there no conflict among courts on this subject, but there has been almost no percolation of the issue among state or federal courts that could assist in this Court's analysis.

Indeed, this case is an especially poor vehicle for review given its particularly fact-bound nature. In the words of Tolstoy, "Happy families are all alike; every unhappy family is unhappy in its own way." Leo Tolstoy, *Anna Karenina* 5 (Constance Garnett trans., Barnes & Noble Classics 2003) (1877). It is highly unlikely that the mix of circumstances material to this case, ranging from the timing of the parties' civil union to the status of New York law on civil union recognition at that point, will arise again with any frequency in New York, much less in any other jurisdiction. Moreover, the case has not even run its course in the New York courts, with potentially significant fact-finding and custody and visitation determinations yet to occur. This case, like the circumstances of the particular family involved, is too uncommon to justify *certiorari*.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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November 30, 2010